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82-810

No. _____

In The Supreme Court of the United States

October Term, 1982

DORSEY RAY LANG and
ROY LEE BUTTERWORTH, JR., Petitioners
v.
UNITED STATES OF AMERICA, Respondent

On Writ of Certiorari
From the United States Court of Appeals
For the Fourth Circuit

Petition for Writ of Certiorari

M. Randall Peek
Attorney at Law
125 Trinity Place
Room 304
Decatur, Georgia 30030
(404) 378-4893

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I. Whether the Court erred in beginning the trial in the absence of lead counsel for the defendants?

II. Whether the Court erred in not directing a verdict or judgment of acquittal on the charge of conspiracy in that the evidence was insufficient as a matter of law?

III. Whether the Court erred in not directing and granting a motion for Judgment of Acquittal on the charge of receipt and possession of stolen property moving in interstate commerce?

IV. Whether the Court erred in allowing the testimony of Mangum as to identity of Lang due to impermissible showup confrontation immediately prior to trial?

V. Whether the Court erred in allowing into evidence testimony of other alleged crimes and acts under Rule 404 (b)?

VI. Whether the Court erred in allowing introduction into evidence the purported statement of defendant Lang?

VII. Whether the Court erred in allowing the Attorney for the Government to cross-examine character witnesses for the defendants concerning a different incident from that on trial?

VIII. Whether the Court erred by denying defendant's motion for judgment of acquittal?

IX. Whether the Court erred in failing to grant the motion of defendants Lang and Butterworth for a new trial?

X. Whether the court failed to consider factually the subsequent transaction was staged by Agents of the Federal Bureau of Investigation in order to create the required similarity for introduction and admissibility.

XI. Whether the court failed to consider the similar case of *United States of America, Appellee v. Roy Lee Davis, Appellant,* found at 657 F. 2d 637 (1981).

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1. Title 18 - United States Code - Section 371
2. Title 18 - United States Code - Section 2315
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1. Federal Rule of Criminal Procedure 29 (a)
2. Federal Rule of Criminal Procedure 33
3. Federal Rule of Evidence 403
4. Federal Rule of Evidence 404 (b)

IN THE
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No. _____

DORSEY RAY LANG
and
ROY LEE BUTTERWORTH, JR., Petitioners,
v.
UNITED STATES OF AMERICA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

The petitioners, Dorsey Ray Lang and Roy Lee Butterworth, Jr. respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals For The Fourth Circuit entered on this proceeding on June 14, 1982.

OPINION BELOW

The opinion of the Court of Appeals for the Fourth Circuit, not yet reported, and denial of rehearing, appear in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on June 14, 1982 and this petition for certiorari was filed within ninety (90) days of that date. This court's jurisdiction is invoked under 28 U.S.C./1254 (1).

QUESTIONS PRESENTED

I. Whether the Court erred in beginning the trial in the absence of lead counsel for the defendants?

II. Whether the Court erred in not directing a verdict or judgment of acquittal on the charge of conspiracy in that the evidence was insufficient as a matter of law?

III. Whether the Court erred in not directing and granting a motion for Judgment of Acquittal on the charge of receipt and possession of stolen property moving in interstate commerce?

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XI. Whether the court failed to consider the similar case of *United States of America, Appellee v. Roy Lee Davis, Appellant,* found at 657 F. 2d 637 (1981).

ARGUMENT

POINT ONE

THE DISTRICT COURT ERRED IN BEGINNING THE TRIAL IN THE ABSENCE OF LEAD COUNSEL FOR THE DEFENDANTS

The defendants Lang and Butterworth had employed the legal services of J. Reid Potter of Charlotte, North Carolina to conduct their defense. Prior to trial Lang and Butterworth employed M. Randall Peek, Attorney for Appellants herein, to conduct the actual trial by jury. Peek traveled to Charlotte, North Carolina to meet with Attorneys Potter, William Eaker, representing Laney and John Hasty, representing Franklin, who at that time had not pled guilty, nor executed a plea bargain agreement. It was agreed Peek would be lead counsel for Lang and Butterworth at the upcoming trial. The trial began in the afternoon of August 5, 1981 and Peek was attempting to reach North Carolina by plane but was unavoidably detained in Atlanta due to the strike by the air traffic controllers. In the absence of Peek, voir dire and selection of the jury together with testimony of witnesses Stegall and Foley had occurred. (app. p.25, app. p. 39) The defendants had the presence of attorney Potter but they were denied their Sixth Amendment right to effective assistance of counsel by lead trial counsel appearing first before a jury he had not questioned nor been introduced to until the second day of the trial. There was no showing as to prejudice resulting from the delay of trial until the arrival of lead counsel. There was no showing how the Court, jurors or witnesses would have been so inconvenienced by the brief delay, as to justify beginning the trial in absence of the lead counsel. The beginning of the trial and certainly one of the most important phases of trial, voir dire and selection of the jury to try the case in the absence of lead counsel deprived Lang and Butterworth of due process under the Fourteenth Amendment to the United States Constitution and for this cause, a new trial should be granted.

ARGUMENT

POINT TWO

THE DISTRICT COURT ERRED IN NOT DIRECTING VERDICT OR JUDGMENT OF ACQUITTAL ON THE CHARGE OF CONSPIRACY IN THAT THE EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW

The Government has alleged a conspiracy between Franklin and Mangum to violate the law as set forth in United States Code Title 18, Sections 659 and 2315 by stealing a tractor, trailer and load of coffee, all moving in interstate commerce. (Criminal Indictment C-CR-81-30, U.S. District Court for the Western District of North Carolina, Charlotte Division). Lang and Butterworth were not present in North Carolina nor were they privy to any agreement entered into between Franklin and Mangum. Lang and Butterworth had no knowledge of any agreement or even in fact, where Stegall Trucking Company was. Any acts taken during the period of the conspiracy alleged to have been August of 1978 through October 2, 1978 were taken without any knowledge of a conspiracy or in fact any agreement that existed between Franklin and Mangum. Expressions of sympathy or of approval are not sufficient manifestations of such an agreement or conspiracy or the knowledge thereof. *Roberts v. United States,* 416 F.2d 1216, 1220,21 (5th Cir. 1969). Further even if Lang and Butterworth had knowledge of the existence of the agreement or of the conspiracy, this mere knowledge is not sufficient to convict. *United States v. Lopez,* 576 F.2d 840, 844 (10th Cir. 1978). The Government alleges Franklin was a friend and business associate of Lang and Butterworth and they loaned him money based on this friendship, but allege the two men had full knowledge of the conspiracy and their participation therein. However even with knowledge, a desire by the parties to see the conspiracy succeed is not sufficient to convict. *United States v. Bostic,* 480 F.2d 965, 968,69 (6th Cir. 1973). Further even if Lang and Butterworth had knowledge of the conspiracy, their presence at the scene near the truck is insufficient. *United States v. Gordon,* 580 F.2d 827, 835 (5th Cir. 1978) The meeting by Lang and Butterworth with Franklin and Mangum even with knowledge of the conspiracy is not enough to convict. *United States v. Burgos* 579 F.2d 747, 749 (2nd Cir.

1978) Mere voluntary participation in acts with the alleged co-conspirators and even general knowledge of their intent to break the law is not sufficient to convict for conspiracy. *United States v. Purin*, 486 F.2d 1363, 1369 (2d Cir. 1973) cert. denied 417 U.S. 930 1974). Lang and Butterworth have for some time been in the salvage merchandise business but it is important to note even knowledge of the character of the goods involved such as the coffee does not establish the defendants to be conspirators. *United States v. Braico*, 422 F.2d 542, 544 (7th Cir.) cert. denied 398 U.S. 912 (1970) *United States v. Varelli*, 407 F.2d 735, 748 (7th Cir. 1969) cert. denied 405 U.S. 1040 (1972). It is obvious that Lang and Butterworth are late-comers as far as the conspiracy is concerned. They certainly did not plan it and as a matter of fact, their conduct is directly consistent with persons who rejected membership in and participation with any conspiracy to violate the law. They did not purchase the coffee. Under certain circumstances such as the ones in this case, the defendant is liable for the act of a co-conspirator only for the "fair import of the concerted purpose or agreement as he understands it; if original parties or other latecomers change that, he is not liable for the change. *United States v. Peoni*, 100 F.2d 401 2d Cir. 1938)

In the present case, Lang and Butterworth were not told the coffee was stolen. Franklin said the coffee had been driven off the lot by Mangum. (app. p. 91) This evidence does not show beyond a reasonable doubt, the entry of Lang and Butterworth into the conspiracy. Although circumstantial evidence may be used to prove a conspiracy without ever showing the existence of any formal agreement, there must be proof beyond a reasonable doubt that a conspiracy existed, that the accused know of the conspiracy, and that they intended to join or associate themselves with the objects of the conspiracy. **United States v. Caicedonasprilla**, 632 F.2d 1161, 1166 (5th Cir. 1980), *United States v. David E. Thompson, Inc.*, 621 F.2d 1147 (1st Cir. 1980) The evidence showed Lang and Butterworth rejected purchase of the coffee and the only acts done by either of them were done to accommodate Franklin. For these acts of friendship they are now convicted of having knowledge of the existence of a conspiracy between Franklin and Mangum and to have willingly joined therein.

Because of the lack of sufficient evidence to establish the conspiracy count as a matter of law, this charge should not have been submitted to the jury, and the motion for judgment of acquittal made by defendants at the close of the case by the

Government should have been granted.

ARGUMENT

POINT THREE

THE DISTRICT COURT ERRED IN NOT DIRECTING AND GRANTING A MOTION FOR JUDGMENT OF ACQUITTAL ON THE CHARGE OF RECEIPT AND POSSESSION OF STOLEN PROPERTY MOVING IN INTERSTATE COMMERCE

There was not sufficient evidence to submit the charge of receipt and possession to the jury as to defendants Lang and Butterworth. There are two methods of possession of property in law. One is actual and the other is constructive. Neither Lang nor Butterworth exerted any actual control over the tractor, trailer or coffee. It was apparent from the record and trial that Mangum was not inclined to part with his actual control over the property until he was paid a sum of money. Once Franklin paid this sum, Mangum transferred control of the property to Franklin. Control remained with Franklin until he transferred control of the coffee by sale to Laney. Mangum retained control of the tractor as he concealed it in Georgia. Franklin transferred control of the trailer to one Hester, who subsequently sold it to one Feldman back in Georgia. It is interesting to note at this juncture the allegation of the Government that Mangum and Franklin had an agreement which formed the basis of a conspiracy to steal and sell the merchandise. Mangum alone must have formed the intent to steal the merchandise for he would not release it, nor accompany his alleged co-conspirator to other locations to attempt its sale. Mangum rather wanted to be paid, which he was in the sum of $7,000.00 and then abandon the tractor and leave, having no further contact with the merchandise or the rather handsome profit later made by Franklin. The tractor, trailer and coffee were left on the property of Lang and Butterworth only as an accommodation to Franklin. What right-thinking man would leave a trailer load of stolen coffee, subject of an interstate conspiracy on his property, if he had knowledge of the facts involved. The evidence shows Lang and Butterworth were offered the purchase of the coffee which they refused. This fact shows they rejected membership in the conspiracy and rejected any possessory interest in or control over the merchandise involved. For this reason, the evidence was insufficient to allow

the charge of receipt of the tractor, trailer and coffee as contained in counts eight and nine of the indictment, to be submitted to a jury and the trial court erred in not granting the motion of defendants Lang and Butterworth for a judgment of acquittal.

ARGUMENT

POINT FOUR

THE DISTRICT COURT ERRED IN ALLOWING THE TESTIMONY OF MANGUM AS TO IDENTITY OF LANG DUE TO IMPERMISSIBLE SHOWUP CONFRONTATION IMMEDIATELY PRIOR TO TRIAL

The trial court erred in allowing Mangum to testify concerning the identity of defendant Lang whom he had first seen on September 26, 1978. (app. p. 51) Prior to that date Mangum had never seen Lang. About two months prior to the trial which began on August 5, 1981, Agents of the F.B.I. took Mangum to Douglasville, Georgia and had him view Lang (app. p. 66) knowing this would afford him an opportunity to identify Lang in court during trial. Testimony of Mangum in court was thus not testimony based on his introduction to and view of Lang in 1978, but rather based entirely on his viewing in 1981 immediately prior to trial. To thus prepare Mangum for the trial, and there is no record of what additional devices were used to reconstruct his testimony and recollection of prior events, violated the rights of defendants Lang and Butterworth to due process, equal protection of the law, and a fair trial under the Fourteenth Amendment to the United States Constitution, and the conduct constituted an impermissible one-on-one showup to aid Mangum in testifying at trial. *Robinson v. Smith*, 624 F.2d 54 (1980).

This improper conduct and procedure so prejudices the rights of the defendants to a fair trial that the judgement of acquittal and in the alternative, the motion for new trial should have been granted by the trial court.

ARGUMENT

POINT FIVE

THE TRIAL COURT ERRED IN ALLOWING INTO EVIDENCE TESTIMONY OF OTHER ALLEGED CRIMES AND ACTS UNDER RULE 404 (b)

The most prejudicial portion of the evidence and that which demands reversal and the grant of a new trial for Lang and Butterworth was the allowing into evidence testimony concerning acts for which the defendants were not on trial nor had they been convicted of. This evidence began in the testimony of one Michael Conway Carpenter. Carpenter was a paid F.B.I. informant who earned $43,000.00 per annum from the government of the United States distributed through the F.B.I. in cash. (app. p. 197) Carpenter testified he met Lang and Butterworth for the first time November 2, 1978. This date is at least one month after the end of the conspiracy which ended on or about October 2, 1978. (indictment C-CR-81-30 supra). Thus Carpenter had no knowledge of the conspiracy nor could his testimony be relevant concerning this trial. Carpenter had been involved in the purchase of the trailer which had originally contained the load of coffee subject of this trial, but this trailer had been sold to one Feldman on October 2, 1978 thus ending the conspiracy. Therefore, any testimony of Carpenter concerning defendants Lang and Butterworth was not relevant. Even if one attaches a slight quantum of relevancy to his testimony, it demanded exclusion under Rule 403 for its prejudice far outweighed its probative value. *United States v. Brown* 490 F. 2d 758 (D.C. cir. 1973)

The parade of prejudicial matter continued with the testimony of Agent Robinette of the F.B.I. Once indicted in the Northern District Court in Georgia with charges dismissed and subsequently re-indicted but untried as of the date of this trial, Lang and Butterworth were faced with testimony concerning an event which took place one year after the charge now being tried. The later incident involving the alleged attempted sale of sugar to Lang and Butterworth occurred on September 28, 1979. The case now being tried involved theft of coffee on September 26, 1978 and a conspiracy which ended on October 2, 1978. The allowance of this testimony into the trial was so prejudicial that its exclusion was demanded under Rule 403. *United States v. Janes,* 555 F.2d 992 (D.C. Cir. 1977), *United States v. Free,* 574 F.2d 1221 (5th Cir. 1978) Evidence of other crimes or of prior conduct must be virtually identical and the acts must have occurred during a time period proximate to the crime charged in order to be admissible even if other factors are satisfied. *United States v. Buck,* 548 F.2d 871 (9th Cir. 1977).

The admissibility of other acts than the one on trial is fur-

ther dependent on (1) the relevance of the evidence for a purpose other than to show character; (2) the evidence must be more probative than prejudicial under the standards set forth under Federal Rule 403; and (3) that the act or offense be shown by clear and convincing evidence. *United States v. Bronco,* 597 F.2d 1300 (9th Cir. 1979), *United States v. Dolliole,* 597 F.2d 102 (7th Cir. 1979), *United States v. Frederickson,* 601 F.2d 1358 (8th Cir. 1979).

The Court must apply the balancing test weighing probative value against prejudicial effect. *United States v. Natale,* 526 F.2d 1160, 1173 (2nd Cir. 1975) cert. denied 425 U.S. 950, *United States v. Bloom,* 538 F.2d 704 (5th Cir. 1976). Certainly the fact that the testimony offered concerns an incident which occurred more than one year after the one being tried and nearly one year after the conspiracy had ended, demonstrates such clear and convincing prejudice as to demand reversal of the conviction of Lang and Butterworth and the grant of a new trial, excluding any evidence of these acts not otherwise admissible. *United States v. Jiminez,* 613 F.2d 1373 (5th Cir. 1980) To allow this conviction to stand would be to allow introduction of subsequent acts without any regard to how long they occurred after the cause being tried. Evidence of an incident occurring nearly one year after the one being tried must by this very fact have a very limited relevance to any predisposition Lang and Butterworth may have had to violate the law. The further fact the sugar case following rather than preceded the coffee case further diminishes its relevance and increases its prejudice. The Court in applying the balancing test failed to state what factors he included in determining the admissibility of the evidence. *United States v. Fuentes-Lozano,* 600 F. 2d 552 (5th Cir. 1979), *United States v. O'Connor,* 580 F.2d 38 (1978), *United States v. Boyd,* 595 F.2d 120 (3rd Cir. 1978).

To examine the two cases for similarity, again the evidence would require exclusion. Not only are the two cases far apart in time as set forth above, but they are not similar. One involved a theft of coffee by two persons the government alleges to be thieves who were looking for someone to sell the coffee to. Lang and Butterworth rejected the purchase of this coffee. In the sugar case, two thieves steal a load of sugar, but do not divert it from its destination except at the direction of the F.B.I. The sale of the sugar is offered to the F.B.I. who has purchased stolen property from the person or persons before as a part of an undercover operation. The F.B.I. then tries to

sell the load of sugar to Lang and Butterworth who again reject purchase. The sugar then continues on its way arriving without further incident. If admissibility of the testimony of Carpenter and of Robinette is claimed by the Government as to similarity of incidents, then the principal similarity demands a finding for Lang and Butterworth who each time reject purchase of the stolen property. This can hardly be urged the conduct of guilty parties or of conspirators.

The introduction of this evidence is prejudicial and clearly violates the exclusion required in Rule 403 and for this reason the Trial Court erred in admitting the testimony of Carpenter and Robinette. The Court further erred in not granting the requested judgment of acquittal for the defendants and further erred in failing to grant the motion for new trial.

ARGUMENT

POINT SIX

THE TRIAL COURT ERRED IN ALLOWING INTRODUCTION INTO EVIDENCE THE PURPORTED STATEMENT OF DEFENDANT LANG

The Court conducted a hearing out of the presence of the jury concerning the interview of defendant Lang by Agent Robinette as to the free and voluntary nature of any statement made. Robinette could not remember whether he had advised Lang of his rights from a form used by the agency for whom Robinette worked or whether he advised Lang of the rights commonly called "miranda rights" from his own memory. If done from memory then certainly no one can be sure what rights were given. Robinette then testified on re-direct (app. p. 238) that he had written on his form 302 summary that Lang had read the waiver form and signed it. (app. p. 238). However, Robinette had previously testified Lang had stated he would say nothing without a lawyer and would not sign any document without presence of counsel. (app. p. 233) This contradiction in testimony is enough to exclude any testimony by Lang for there is no showing of voluntariness or freedom in making any statement. Notwithstanding the statement of Lang that he desired an attorney, Robinette continues to question Lang about "fencing" activities. (app. p. 234) We are further told Lang was not in custody so therefore anything he said is admissible. If not in custody and if having asked for counsel, the government can continue questions, delay any arrest, and then justify admission, then the rights sought to be insured by

Miranda warnings do not exist or if they slightly exist, are totally without meaning.

The statement offered by the government as an untrue denial of knowledge by Lang of the coffee shipment should have been suppressed and not allowed in evidence as it was not voluntary or free and was made, if at all, after the defendant Lang had been denied assistance of counsel, in violation of the rights conferred him by the Sixth Amendment to the United States Constitution. Therefore, failure to exclude this statement merits reversal of the conviction and ordering of a new trial for Lang and Butterworth.

ARGUMENT

POINT SEVEN

THE TRIAL COURT ERRED IN ALLOWING THE ATTORNEY FOR THE GOVERNMENT TO CROSS—EXAMINE CHARACTER WITNESSES FOR THE DEFENDANTS CONCERNING A DIFFERENT INCIDENT FROM THAT ON TRIAL

Defendants Lang and Butterworth produced at trial a series of character witnesses numbering approximately eight to testify as to the good character of each man. *Michelson v. United States,* 335 U.S. 469 (1948) During the cross-examination of each character witness, the attorney for the government asked if the witness knew Lang and Butterworth had been indicted or charged with a crime in the District Court in Atlanta. (app. p. 371) Evidence of the charge in Atlanta should have been excluded by Rule 403 and likewise any question directed to any character witness should have been excluded. To allow the attorney for the Government to ask this question was to reinforce prejudicial evidence in the minds of the jurors and to admit again that evidence which had no probative value regarding the incident being tried. This testimony was strenously objected to and should have been excluded. Failure to so exclude should result in the grant of a new trial by reversal of the conviction of Lang and Butterworth.

ARGUMENT

POINT EIGHT

THE TRIAL COURT ERRED BY DENYING DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL

At the close of the case for the Government, the defendants moved pursuant to Federal Rule of Criminal Procedure 29 (a) for a judgment of acquittal. (app. p. 297) The evidence for the government was insufficient to allow its submission to the jury on the counts one, eight and nine of the indictment. The testimony of Mangum and Franklin as to the existence of the agreement was in conflict and if no agreement then no conspiracy and the act of each of the parties should have been determined as aiders and abettors at the very best, rather than as co-conspirators. If there is sufficient evidence as to the existence of the conspiracy in the first place, everything happening after that is doubtful. The motion for judgment of acquittal should therefore have been granted as to the conspiracy count and defendants Lang and Butterworth hereby incorporate herein their arguments numbered point two and point three in this brief as further reasons why the Court should have granted this judgment of acquittal. Reversal and new trial should be granted.

ARGUMENT

POINT NINE

THE TRIAL COURT ERRED IN FAILING THE GRANT OF MOTION OF DEFENDANTS LANG AND BUTTERWORTH FOR A NEW TRIAL

Following their conviction the defendants Lang and Butterworth moved the Court for a new trial by motion filed under authority of Federal Rules of Criminal Procedure 33. The motion was denied without hearing and further without stating why the motion for new trial was denied, thus effectively preventing appellate review. The defendants herein submit the grounds for new trial were sufficient to require an evidentiary hearing or in the alternative, to require the Court to state its reasons for denial of the motion for new trial without allowing the defendants an evidentiary hearing. *United States v. Herman,* 614 F.2d. 369 (3rd Cir. 1980). This denial of new trial without hearing requires reversal and the ordering of a new trial.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 18

§371. Conspiracy to commit offense to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more that five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

§659. Interstate or foreign shipments by carrier; State prosecutions

Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any pipeline system, railroad car, wagon, motortruck, or other vehicle, or from any tank or storage facility, station, station house, platform or depot or from any steamboat, vessel, or wharf, or from any aircraft, air terminal, airport, aircraft terminal or air navigation facility with intent to convert to his own use any goods or chattels moving as or which are a part of or which consititute an interstate or foreign shipment or freight, express, or other property, or:

Whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been embezzled or stolen; or

Whoever embezzles, steals, or unlawfully takes, carries away, or by fraud or deception obtains with intent to convert to his own use any baggage which shall have come into the possession of any common carrier for transportation in interstate or foreign commerce or breaks into, steals, takes, carries away, or conceals any of the contents of such baggage, or buys, receives, or has in his possession any such baggage or any article therefrom of whatever nature, knowing the same to have been embezzled or stolen; or

Whoever embezzles, steals, or unlawfully takes by any fraudulent device, scheme, or game, from any railroad car, bus, vehicle, steamboat, vessel, or aircraft operated by any common carrier moving in interstate or foreign commerce or from any passenger thereon any money, baggage, goods, or

chattels, or whoever buys, receives, or has in his possession any such money, baggage, goods, or chattels, knowing the same to have been embezzled or stolen—

Shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both; but if the amount or value of such money, baggage, goods or chattels does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

The offense shall be deemed to have been committed not only in the district where the violation first occured, but also in any district in which the defendant may have taken or been in possession of the said money, baggage, goods, or chattels.

The carrying or transporting of any such money, freight, express, baggage, goods, or chattels in interstate or foreign commerce, knowing the same to have been stolen, shall constitute a separate offense and subject the offender to the penalties under this section for unlawful taking, and the offense shall be deemed to have been committed in any district into which such money, freight, express, baggage, goods, or chattels shall have been removed or into which the same shall have been brought by such offender.

To establish the interstate or foreign commerce character of any shipment in any prosecution under this section the waybill or other shipping document of such shipment shall be prima facie evidence of the place from which and to which such shipment was made. The removal of property from a pipeline system which extends interstate shall be prima facie evidence of the interstate character of the shipment of the property.

A judgment of conviction of acquittal on the merits under the laws of any State shall be a bar to any prosecution under this section for the same act or acts. Nothing contained in this section shall be construed as indicating an intent on the part of Congress to occupy the field in which provisions of this section operate to the exclusion of State laws on the same subject matter, nor shall any provision of this section be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this section or any provision thereof.

June 25, 1948, c. 645, 62 Stat. 729; May 24, 1949, c. 139 § 13, 63 Stat. 91; Oct. 14, 1966, Pub. L. 89-645, § 1 (a)—(d), 80 Stat. 904.

§2315. Sale or receipt of stolen goods, securities, fraudulent State tax stamps

Whoever receives, conceals, stores, barters, sells, or disposes of any goods, wares, or merchandise, securities, or money of the value of $5,000 or more, or pledges or accepts as security for a loan any goods, wares, or merchandise, or securities, of the value of $5,000 or more, moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been stolen, unlawfully converted, or taken; or

Whoever receives, conceals, stores, barters, sells, or disposes of any falsely made, forged, altered, or counterfeited securities or tax stamps, or pledges or accepts as security for a loan any falsely made, forged, altered, or counterfeited securities or tax stamps, moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been so falsely made, forged, altered, or counterfeited; or

Whoever receives in interstate or foreign commerce, or conceals, stores, barters, sells, or disposes of, any tool, implement, or thing used or intended to be used in falsely making, forging, altering, or counterfeiting any security or tax stamp, or any part thereof, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing that the same is fitted to be used, or has been used, in falsely making, forging, altering, or counterfeiting any security or tax satmp, or any part thereof—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

This section shall not apply to any falsely made, forged, altered, counterfeited, or spurious representation of an obligation or other security of the United States or of an obligation, bond, certificate, security, treasury note, bill, promise to pay, or bank note, issued by any foreign government or by a bank or corporation of any foreign country.

June 25, 1948, c. 645, 62 Stat. 806; Oct. 4, 1961, Pub.L. 87—371, § 3, 75 Stat. 802

Federal Rules of Criminal Procedure 29. Motion for Judgment of Acquittal

(a) Motion before Submission to Jury. Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense

or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.

Federal Rules of Criminal Procedure 33. New Trial

The court on motion of a defendant may grant a new trial to him if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after fianl judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7-day period.

Federal Rules of Criminal Procedure 403. Exclusion of Relevant Evidence on Ground of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Federal Rules of Criminal Procedure 404. Character Evidence Not Admissible To Prove Conduct; Exceptions; Other Crimes

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

STATEMENT OF THE CASE

This appeal is from a verdict by jury and sentence thereafter

on August 7, 1981 in Indictment numbered C-CR-81-30 in the United States District Court for the Western District of North Carolina, Charlotte Division, finding defendants Dorsey Ray Lang and Roy Lee Butterworth, Jr. guilty of Counts 1, 8, and 9 of the said indictment. Sentence as to each defendant were the subject of a motion for new trial filed on August 13, 1981 and subsequently denied on August 14, 1981 without hearing. Thereafter a notice of appeal was fiied August 21, 1981 and affirmed by the Fourth District on June 14, 1982.

On September 26, 1978 it was alleged by one Malcolm Landis Mangum, Jr., a defendant testifying after having entered into a plea bargain with the Government which admitted his probation status for a similar offense (app. p. 50,51) that he stole a tractor and a trailer form Stegall Truck Lines at the plan and direction of one George Edward Franklin, Jr. (app. p. 72). Mangum drove to meet Franklin and following an Examination of the contents of the trailer the two men drove in separate vehicles from Charlotte, North Carolina to Atlanta, Georgia. Franklin knew Lang and Butterworth and by telephone contacted them to view the contents of the trailer with a view toward purchase by them for resale in their legitimate salvage business in Douglasville, Georgia. (app. p. 116). After viewing the contents of the trailer, Lang and Butterworth rejected any purchase, (app. 90-) and they were persuaded by Franklin to lend him the money to purchase the contents from Mangum. (app. 90). Of the $10,000.00 Mangum requested Franklin pay him for the contents, Franklin only paid $7,000.00 and gave as the excuse that Lang and Butterworth had bought the load but only paid $7,000.00. Both these statements were false. (app. p. 93). Franklin asked Lang and Butterworth, who had urged the tractor and trailer be moved (app. p. 125) for help in locating a driver. Tom Hester, a defendant in the said case was employed by Franklin to pull the trailer and its contents to Charlotte for sale to Henry Fairley Laney. (app. p. 103). Franklin allowed Hester to leave with the trailer which Hester sold to a co-defendant, Herbert Spencer Feldman, Sr. back in Atlanta. (app. p. 162). The record shows neither Lang nor Butterworth received any coffee nor did they receive any profit from the sale of the coffee. Rather the record shows Franklin paid back the loaned money totaling $11,000.00 and that Franklin had been paid $29,680.00 by Laney, (app. 131) plus he had kept $3,000.00 from the original amount given him by Lang and Butterworth.

The Government brought in the testimony of one Michael Carpenter, a paid informant for the F.B.I., (app. 184) with regard to events in Atlanta during the latter months of 1978, notwithstanding the fact that Carpenter did not meet Lang or Butterworth until after the conspiracy had ended. (app. p. 193). This testimony had nothing whatsoever to do with the theft of the shipment of coffee involved in this trial.

REASONS FOR GRANTING THE WRIT

The Supreme Court of the United States should grant the writ of certiorari submitted by petitioners due to substantial issues of law as presented during trial and during appeal. It is the right of a criminal defendant to be tried on evidence relating to his guilt for the offense charged without the introduction of other evidence. There are certain narrow exceptions as contained in Rule 404 (b). However in the balancing test as required by Rule 403 the District Court should make some finding for the record to indicate why the Court felt the admission of the evidence was allowed following the application of the test. To simply allow into evidence other transactions than the one being tried is to dilute or eliminate the provisions of Rule 403 and to thereby say than any evidence of any sort, previous or subsequent, can be used against a defendant at trial, thereby prejudicing the jury into thinking the defendant is guilty of the crime being tried because of evidence of another untried offense. In this particular case it is clear the conviction of Lang and Butterworth was obtained by use of an incident occuring in Atlanta, Georgia nearly one year subsequent to the case being tried in North Carolina. While the Courts have admitted certain evidence of prior offenses at a subsequent trial to show the motive, scheme or bent of mind of a defendant, I find no Court that has admitted evidence of an incident nearly one year *subsequent* and from this admission, argue the state of mind or intent of the defendant during a *prior* incident. The Fifth Circuit has indicated in *Jiminez*, supra that evidence of a subsequent transaction is of limited relevance, if any, during the trial of a prior incident. Certainly applying the limited relevance in the balancing test of Rule 403, would require exclusion. The need for this Court to review and make a declaration regarding the requirements in applying the two rules is evident so that defendants, counsel and District Courts can properly prepare for trial and rulings based on the factual context of each case. Only by this Court granting this

Writ and ruling thereon can a litigant be assured of a final determination and requirement of the introduction of such evidence.

One glaring reason for the granting of this Writ is that the subsequent incident relied upon and introduced into evidence was staged and planned by Agents of the Federal Bureau of Investigation. To allow the Government to review an alleged criminal offense and to determine a lack of evidence for successful prosecution, and to then plan an incident and stage the similarities to the first incident, and to then try the defendant based on the two incidents is to deny any criminal defendant that protection which this country so long sought. if this Court does not grant this Writ and review this case, then at any time in the future, Agents of the Government can plan an incident and create the similarity required by Rule 404 (b). A defendant can understand that if he commits a similar crime, such evidence can be used against him. However to deny this Writ and thereby sanction the type of conduct in this case is to say to a defendant that with all resources available to the Government, they will present to you an incident and no matter how you react, say this incident is similar to the one being tried, and thereby deny to the defendant a fair trial and due process equal protection of the law.

For the reasons as set forth in the legal portion of this Writ and these urgings, the petitioners respectfully request this Court to grant their Writ and upon hearing thereon, to reverse their conviction on the foregoing, and to grant them a new and fair trial with the harmful and prejudicial material being deleted therefrom.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fourth Circuit.

Respectfully submitted,

M. Randall Peek
Room 304 Executive Building
125 Trinity Place
Decatur, Georgia 30030